**ALASKA STATE LEGISLATURE**
**SENATE JUDICIARY STANDING COMMITTEE**
February 1, 2012
1:32 p.m.

**MEMBERS PRESENT**

Senator Hollis French, Chair
Senator Bill Wielechowski, Vice Chair
Senator Joe Paskvan
Senator Lesil McGuire
Senator John Coghill

**MEMBERS ABSENT**

All members present

**COMMITTEE CALENDAR**

SENATE BILL NO. 173
"An Act making corrective amendments to the Alaska Statutes as recommended by the revisor of statutes; and providing for an effective date."

- MOVED SB 173 OUT OF COMMITTEE

SENATE BILL NO. 165
"An Act relating to property exemptions for retirement plans; relating to pleadings, orders, liability, and notices under the Uniform Probate Code; relating to the Alaska Principal and Income Act; relating to the Alaska Uniform Transfers to Minors Act; relating to the disposition of human remains; relating to insurable interests for life insurance policies; relating to transfers of individual retirement plans; relating to the community property of married persons; and amending Rule 301(a), Alaska Rules of Evidence."

- HEARD & HELD

UPDATE ON CASE DISMISSALS

- HEARD

**PREVIOUS COMMITTEE ACTION**

BILL: SB 173
SHORT TITLE: 2012 REVISOR'S BILL

SPONSOR(s): RULES BY REQUEST OF LEGISLATIVE COUNCIL

| | | |
|---|---|---|
| 01/23/12 | (S) | READ THE FIRST TIME - REFERRALS |
| 01/23/12 | (S) | JUD |
| 01/30/12 | (S) | JUD AT 1:30 PM BELTZ 105 (TSBldg) |
| 01/30/12 | (S) | Heard & Held |
| 01/30/12 | (S) | MINUTE(JUD) |

BILL: SB 165
SHORT TITLE: PRINCIP.& INC/PROBATE/UTMA/RETIREMT/ETC.
SPONSOR(s): JUDICIARY

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|---|---|---|
| 01/17/12 | (S) | READ THE FIRST TIME - REFERRALS |
| 01/17/12 | (S) | JUD, FIN |
| 02/01/12 | (S) | JUD AT 1:30 PM BELTZ 105 (TSBldg) |

**WITNESS REGISTER**

CINDY SMITH, Staff to Senator French, and
Aide to the Senate Judiciary Committee
Alaska State Legislature
Juneau, AK
**POSITION STATEMENT**: Introduced SB 165.

DAVID SHAFTEL, Attorney
Anchorage, AK
**POSITION STATEMENT**: Provided a sectional analysis for SB 165.

DOUGLAS BLATTMACHR, President and CEO
Alaska Trust Company
Anchorage, AK
**POSITION STATEMENT**: Stated support for SB 165.

NANCY MEADE, General Counsel
Alaska Court System
Anchorage, AK
**POSITION STATEMENT**: Provided information on dismissal rates for FY11 felony cases.

JOHN SKIDMORE, Director
Criminal Division
Department of Law
Anchorage, AK
**POSITION STATEMENT**: Discussed FY11 felony dispositions from the DOL perspective.

**ACTION NARRATIVE**

1:32:48 PM
**CHAIR HOLLIS FRENCH** called the Senate Judiciary Standing Committee meeting to order at 1:32 p.m. Present at the call to order were Senators Coghill, Paskvan, McGuire, and French. Senator Wielechowski during the opening remarks.

## SB 173-2012 REVISOR'S BILL

1:33:39 PM
CHAIR FRENCH announced the consideration of SB 173. He noted that the bill was heard previously and the assistant revisor was available if there were questions. Finding no public testimony, he closed it. Finding no committee discussion, he solicited a motion.

1:34:18 PM
SENATOR WIELECHOWSKI moved to report SB 173 from committee with individual recommendations and attached fiscal note.

CHAIR FRENCH announced that without objection, SB 173 moved from the Senate Judiciary Standing Committee.

1:34:34 PM
At ease from 1:34 p.m. to 1:36 p.m.

## SB 165-PRINCIP.& INC/PROBATE/UTMA/RETIREMT/ETC.

1:36:18 PM
CHAIR FRENCH announced the consideration of SB 165 and asked for a motion to adopt the proposed committee substitute (CS), version D.

1:36:45 PM
SENATOR WIELECHOWSKI moved [to adopt the work draft CS for SB 165, labeled 27-LS0819\D, as the working document.]

CHAIR FRENCH found no objection and announced that version D was before the committee.

CINDY SMITH, staff to Senator French and aide to the Senate Judiciary Committee, read the sponsor statement for SB 165 into the record.

> Alaska first modernized its trust and estate legislation in 1997. Since then, the trust and estate

planning community continuously makes recommendations to the legislature for updates and improvements to Alaska's trust and estate laws to ensure that Alaska can continue to provide the best possible planning solutions. Alaska's trust and estate laws have significant impact on our economy, bringing literally millions of dollars to the state and creating jobs within the trust, banking, insurance and legal fields.

Senate Bill 165 provides for amendments to statute in the following areas:

- Extends protection for retirement plan assets to the beneficiaries of retirement plans (often the surviving spouse).
- Provides means of representation for minors and incapacitated persons in dealing with settlements of accounts or settlement agreements.
- Amends the 2003 Alaska Principal and Income Act to conform with current IRS regulations.
- Provides rules concerning who may control the disposition of decedents' remains.
- Makes conforming amendments to Alaska's laws regarding insurable interests to align with changes to the Uniform Trust Code.
- Provides that IRA interests can be voluntarily transferred to a family member or trust.
- Makes amendments to Alaska's community property provisions to update and clarify the ownership of community property.
- Allows a beneficiary to extend the time that funds will be held in a Uniform Transfer to Minors Account

Passage of SB 165 will ensure that Alaska remains the premier state in which to establish trusts and estates.

CHAIR FRENCH asked Mr. Shaftel to provide the sectional analysis.

1:39:08 PM
DAVID SHAFTEL, Attorney, said he works in the areas of estate planning and trust and estate administration, and is a member of an informal group of attorneys, trust officer and financial planners who have been working with the Legislature since 1997

to suggest improvements to Alaska trust and estate laws. He described SB 165 as an excellent bill with a number of substantial provisions that will improve Alaska estate planning statutes.

1:42:02 PM
MR. SHAFTEL provided the following sectional analysis for SB 165.

Section 1 deals with asset protection for inherited retirement plans. Current statute protects an individual's interest in their retirement plan, such as an IRA, from creditor claims, and this extends this protection to claims of a beneficiary's creditors. This provision follows federal bankruptcy law.

SENATOR PASKVAN asked if the asset has to remain in the IRA.

MR. SHAFTEL replied it has to remain in the IRA, which is most advantageous to the beneficiary such as a surviving spouse because it can be spread it over his or her lifetime. Income tax is only paid when the funds are distributed.

SENATOR PASKVAN asked if there is a cap on the amount that can be withdrawn and still protected under federal bankruptcy law.

MR. SHAFTEL replied that under the 2005 bankruptcy Act the maximum amount that can be protected is $1 million. That's for an IRA that an individual creates and contributes to over his or her lifetime and is rolled over.

SENATOR PASKVAN said he was focusing on the income stream flowing from the corpus. He asked if an income stream of $20,000 per month, for example, would be protected.

MR. SHAFTEL replied the funds are not protected once distributed; this provision protects the funds while in the IRA.

1:46:06 PM
SENATOR FRENCH summarized that if he were to pass away and his wife was the beneficiary of his $1 million IRA, those funds would be protected against federal bankruptcy claims as well as state bankruptcy claims under SB 165. He asked if a $100,000 withdrawal would be subject to creditor claims under both federal and state law.

MR. SHAFTEL answered yes. A creditor cannot reach any of the $1 million while it's in the fund, but a creditor could reach any

distribution from that fund made over the beneficiary's lifetime.

CHAIR FRENCH commented that it's an interesting balancing act between the creditor and the inheritor.

1:47:59 PM
MR. SHAFTEL said the next substantive provision is in Section 4, representation for settlement agreements. Current statute provides that minors and incapacitated persons may be represented by another person who has the same interests in the matter. This clarifies that it applies to both judicial and non-judicial settlements.

Sections 6-22 amend the 2003 the Alaska Principal and Income Act, which allows a person creating a new trust, or a trustee of an existing trust, to adopt a "unitrust" approach for determining the income of the trust that may have to be distributed annually. This amendment allows a trustee to select a unitrust rate ranging from three percent to five percent averaged over 5 years, rather than the current four percent rate. An explicit definition of income is provided for a unitrust and language was added to provide an ordering of the distributions among types of income and principal. The new provisions also clarify how unitrust rules will apply to retirement benefits..

1:56:18 PM
SENATOR PASKVAN asked, under the disqualified trustee issue, if there were fiduciary standards in law that the trustee must abide by.

MR. SHAFTEL answered yes; the fiduciary standard is very high. If there is an abuse of discretion and damages result, the injured parties can go to court and the trustee could lose his or her position and be held liable.

SENATOR PASKVAN asked if there are disclosure requirements as to potential conflicts of interest.

MR. SHAFTEL replied there isn't an up-front disclosure for trustees, but the practice in his office, and others, is to give newly appointed trustees a pamphlet that discusses their duties and responsibility so they're made aware up front. The trustees are required to sign that they've read the pamphlet and that becomes part of the trust packet.

CHAIR FRENCH asked what the difference is between a trust and a unitrust.

MR. SHAFTEL explained that the unitrust is a term for the annual payment that's made that is based on a percentage of the principal. The trust itself is a broader instrument. For example, you put $500,000 in a trust for your wife and the remainder to your kids. The trust concept is that you name a trustee for that trust, a bank for example. That trust has certain assets and those are owned by the trustee, the bank, and the bank must administer that trust according to the directions in the trust instrument for the benefit of the beneficiaries. Your wife and children are the beneficiaries in this example. The unitrust amount refers to the fact that you may have set up the trust and directed an annual payout to your wife equal to five percent of the assets in that trust. That concept in itself is called the unitrust.

CHAIR FRENCH commented that it’s simply a designation of the payout mechanism and percentage.

MR. SHAFTEL agreed.

2:00:55 PM
CHAIR FRENCH asked if the percentages established in Section 11 might have to be adjusted in the future in order to maintain the strength of a trust's buying power over time.

MR. SHAFTEL replied the Legislature could do that, and another way would be through the Act itself, which contains provisions for going to court to get a different percentage. If the trustee decides to go to court to petition for a different percentage, everyone gets noticed so that they can exercise their right to participate. In the above example, both the wife and children would have the right to participate.

CHAIR FRENCH noted that the court process was addressed in Section 14.

2:03:22 PM
SENATOR COGHILL asked if the three percent to five percent payout might become a major tax consideration.

MR. SHAFTEL replied the trustee has to take that into consideration as well because the distribution is taxed as ordinary income. If a five percent distribution came out and that trust made more than five percent income that year, it

would all be taxable to the spouse at that point. That isn't any different than in the prior structure that says all the income gets paid out to the spouse every year. For example, if the spouse is getting a payout of $20,000 and the trust earned $20,000 of income that year, there is taxability on that full $20,000.

2:05:49 PM
MR. SHAFTEL said Sections 23-25 amend the Alaska Uniform Transfers to Minors Act. These new provisions address parental concerns about some children's ability to responsibly manage funds. Some years ago Alaska adopted a statute for Uniform Transfer to Minor Accounts that allow parents to gift up to $13,000 per year into their child's account tax free. The custodian of the account, who may or may not be the parent, can use the funds for the benefit of the minor and when the minor reaches age 18 or age 21 those funds become the minor's funds. An IRS provision says the child can have the funds at age 18 or 25 if he or she wants them. Under current state statute the child may agree not to take possession of the funds at age 18 or 21, but the outer limit is age 25. This provision allows the money to be held in that account for much longer periods of time, if the minor consents. It will not run afoul of the Internal Revenue Code regarding these accounts.

2:11:00 PM
SENATOR MCGUIRE asked if it was necessary to delete the existing statutory reference to 25 years of age. She expressed concern that removing the reference would eliminate that option.

MR. SHAFTEL responded the intent was to allow full flexibility to choice any age.

SENATOR MCGUIRE said she wanted to be sure that this amendment wouldn't eliminate the ability to extend custodial control up to age 25, without having to sit down and reason with an 18-year-old. She worried that deleting the reference in Section 23 and Section 25 would eliminate that option.

MR. SHAFTEL recalled that the language "in certain circumstances" referred to the circumstances of going to the child and asking for consent.

SENATOR MCGUIRE asked Mr. Shaftel to follow up with additional information about: 1) what the certain circumstances were, 2) why 21 years of age was referenced - on page 2 of the summary, and 3) why age 25 was referenced. She reiterated her reluctance

to give up an opportunity for more discretion in distribution. She said she would understand if this was necessary to maintain the tax free status of the account, but she wanted to have the discussion. She also asked how long the distribution can be delayed and what recourse the child has if he or she wants to withdraw consent for delayed distribution. She provided an example.

MR. SHAFTEL responded that this account is very much like a trust; a custodian is named but the money belongs to the child. The custodian is like a trustee and is supposed to make decisions to use the money for the child's benefit and would be held accountable for an abuse of discretion.

SENATOR MCGUIRE said it's a good reminder that the same protections apply with respect to abuse of discretion, and that the custodian is managing the account for the benefit of the trustee.

MR. SHAFTEL said that's correct and confirmed he would follow up with the information she requested.

2:18:49 PM
SENATOR PASKVAN questioned whether extending the distribution farther into the future might increase the likelihood that the beneficiary would not consent to the extension. He posed the hypothetical of a minor who at age 21 consented to a 20 year extension, and asked if in five or so years there would be an opportunity for a secondary option.

MR. SHAFTEL responded that while it's not always the case, Alaska law presumes that a person is an adult at age 18 and can make decisions, enter into contracts and be bound; they are responsible for their actions. He opined that a person who has reached age 18 and lacks maturity would likely be resistant to an extension and very resistant to a long-term extension. He suggested that a practical approach would be to revisit the decision to extend at the end of that timeframe. If at that time there still were reasons for an extension, it could be extended again.

The language does not speak to the situation of someone who at age 21 agreed to a 20-year extension and then at age 30 decided the reason for the extension no longer existed. However, the matter could be taken to probate court. The custodian would have to justify any objection they might have, otherwise the extension would likely be terminated.

2:22:44 PM
CHAIR FRENCH directed attention to page 15, Section 15, subsection (i)(1), regarding the power of a minor to compel distribution, and asked for the range of ages that could apply.

MR. SHAFTEL replied depending on the type of transfer, the distribution can be tied up initially until age 18 or age 21. But the statute provides that if at age 18 or age 21 the minor agrees, it can be extended to age 25.

CHAIR FRENCH asked if he was saying that the upper limit for an extension for a minor who does not consent is age 21 and maybe age 25.

MR. SHAFTEL replied it's age 21 unless the minor consented previously.

CHAIR FRENCH asked Mr. Shaftel to double check and follow up with an email, and he would distribute it among the members. He commented that it's a nice circuit breaker for the minor.

MR. SHAFTEL said that Section 26 relating to a decedent's remains was a suggestion by directors of funeral homes to give guidance as to who to take directions from in the disposition of human remains. This provision provides a disposition document that prioritizes the people who will have this authority and estate planning attorneys will have their clients sign the form. The provision includes some technical areas. For example, if people put directions regarding disposition of their remains the will does not have to be probated. There is also a liability provision that says that funeral homes that follow this direction will not be held liable.

2:28:09 PM
CHAIR FRENCH said he's pleased this is being addressed, because it can be very traumatic to try to get a body released.

SENATOR PASKVAN asked if funeral home operators had raised the issue of same sex domestic partners.

MR. SHAFTEL replied that wasn't mentioned directly, but a person could designate a domestic partner as the agent on the prioritized list.

SENATOR PASKVAN asked if that was on page 16, lines 13-14.

MR. SHAFTEL answered yes.

CHAIR FRENCH added that it would need to be done in advance.

MR. SHAFTEL said one of the benefits of this approach is that it allows a person to decide who will have that authority.

Section 27 deals with insurable interests. The concept in the law generally is that for one person to buy an insurance policy and benefit from the death of another person there must be some sort of close connection between the people. Most states have statutes regarding insurable interests, but many are unclear. This provision generally follows the Uniform Trust Code provisions to cure this problem.

Section 28 deals with transfers of IRA interests. This provision clarifies that an individual may transfer his or her IRA into a grantor trust. The transferred assets must be accounted for under the gift tax but those assets and the growth would not be included in the gross estate and taxed at death.

CHAIR FRENCH asked how many jurisdictions had adopted this rule.

MR. SHAFTEL replied this wasn't found in other jurisdictions, it was suggested as something that would be beneficial in minimizing estate taxes at death.

Sections 29-33 add clarification to Alaska's optional community property system that was enacted in 1998. It clarifies that if the spouses determine that an asset is community property, the form of title is not determinative. If the title of the property is in the form of survivorship between the spouses, the presumption is that the survivorship provision does not change. If a spouse designates a beneficiary for an interest in what is community property, it is only effective for that spouse's half interest, unless the other spouse consents in writing. There are also provisions about remedies for improper transfers of community property and limitation periods during which those remedies can be pursued.

2:42:17 PM
SENATOR PASKVAN asked if the surviving spouse's claim would apply only to property that's designated with a right of survivorship or any property acquired during the term of the marriage.

MR. SHAFTEL replied it would not be limited to survivorship property. That was just one area of concern. It could be that a $500,000 account was just in the husband's name but the two spouses together entered into a community property agreement regarding that account. If the husband decides during his lifetime to make gifts of it to his children from a former marriage, the wife can still claim half the money.

CHAIR FRENCH asked Mr. Blattmachr to provide his views on the bill.

2:43:57 PM
DOUGLAS BLATTMACHR, Alaska Trust Company, stated support for SB 165 and urged the committee to pass the bill. It brings clarification and good provisions that Alaskans can use.

CHAIR FRENCH stated that Mr. Shaftel would be invited back to finish explaining the repealers and the last few indirect rule changes. He announced he would hold SB 165 in committee.

## UPDATE on CASE DISMISSALS

2:44:54 PM
CHAIR FRENCH announced the final order of business would be a follow through on an issue that came up during the recent Crime Summit regarding case dismissals. He recognized Nancy Meade with the Court System and John Skidmore with Department of Law.

2:45:38 PM
NANCY MEADE, General Counsel, Alaska Court System, said she would address two separate issues. The first is a follow up to the Crime Summit where she brought up the statistic that in FY11 23.5 percent of felony cases were dismissed. Some members of the committee were surprised about that. The second, separate but not unrelated, issue is the time it is taking for felonies to be disposed.

She directed attention to six one-page reports showing felony case dispositions for FY09, FY10 and FY11 and calendar years 2009, 2010 and 2011. The FY11 report directly addresses the 23.5 percent felony dismissal rate. [In FY11 there were 6,218 dispositions; .5 percent of cases were acquittals, 75.6 percent were convictions, 23.4 percent were dismissals and .5 percent were categorized as other.] The 1,452 (23.5 percent) dismissed cases were categorized by the CourtView case management system. The report shows that 1,065 or 73.3 percent of those cases were dismissed by the prosecution under Criminal Rule 43(a). She noted that Mr. Skidmore could address the reasons.

2:48:23 PM
SENATOR PASKVAN asked if the [4,703] convictions were all felony convictions.

MS. MEADE answered yes and added that in cases where a person is charged with more than one crime, the case is categorized according to the most serious charge within the charging document.

CHAIR FRENCH posed the hypothetical of a person who is charged with vehicle theft, possession of marijuana and possession of cocaine. He asked if the case would count as a conviction, not a dismissal, if the person pleads to the vehicle theft and the drug charges "go away," so to speak.

MS. MEADE answered yes.

CHAIR FRENCH summarized that all the offenses that come under one charging document will be resolved as one case.

MS. MEADE agreed.

2:50:26 PM
JOHN SKIDMORE, Director, Criminal Division, Department of Law (DOL) offered to proceed as directed.

CHAIR FRENCH referred to the Alaska Court System FY11 report of criminal case time to disposition and observed that 28.3 percent of superior court felonies were dismissed between six months and a year after they were filed. He asked why it takes so long for the prosecution to say it couldn't go forward with a case.

MR. SKIDMORE responded that the reason is plea negotiations. Using Senator French's hypothetical, the prosecution might make an offer of one year in jail on that case, but while out on bail the person commits another similar crime. To resolve both cases the prosecution might increase the jail time to 2 years on the first case and agree to dismiss the second case. He opined that, that accounts for a large percentage of those dismissals.

In other situations the prosecution may learn more details about a case as the investigation progresses. The report reflects that some cases remain open and active for 1-2 years and some remain open for longer than 2 years. It's important to understand that the investigation continues throughout that entire time, and that the case sometimes gets better and sometimes weaker. The

prosecution may try to resolve a weaker case through a plea negotiation, or they may decide to dismiss the case.

MR. SKIDMORE apologized that he could not provide percentages for those cases but could say that 70,000 counts were filed in 2011 and 14,000 were dismissed. Over half of those were dismissed because the person pled to something else.

He explained that dismissals are broken into three large categories: evidentiary reasons, discretionary reasons and other legal issues. Evidentiary reasons include things like the mens rea, an issue with a witness and litigation later in that case, all of which cause the prosecution to reevaluate the case. In discretionary dismissals the prosecutor decided to do something other than move forward. That can be because it is essentially a civil matter or the defendant has pled to another case or the counts are consolidated. Other legal issues can include a problem with Rule 45, a deceased or incompetent defendant or that the case was transferred to another agency.

2:56:39 PM
MR. SKIDMORE noted that the report that Ms. Meade discussed categorized as dismissals 224 cases that were not filed. From DOL's perspective those cases are not counted as dismissals.

CHAIR FRENCH highlighted that those cases are disposed of very quickly and have little impact on a defendant. It's an instance of the police arresting somebody and the DA's office not filing a charge.

MR. SKIDMORE agreed and pointed out that the FY11 time to disposition report incorporates those 224 cases as dismissals in the first 120 days. He said another number that jumps out on the disposition report is the 96 cases that are categorized as dismissed due to delay in superior court transfer or Criminal Rule 5(e). That says when somebody is charged with a felony offense the state has 10 days if in custody and 20 days if out of custody to take the case to grand jury. If that doesn't happen in those timeframes, the case will not be transferred from district court into superior court and therefore can't go forward. He said the grand jury is essentially a screening process to decide whether or not there is sufficient evidence for the case to move forward as a felony.

CHAIR FRENCH asked if it's a dismissal with prejudice or without.

MR. SKIDMORE replied it's a dismissal without prejudice. That means the DA can indict later on and that's what happens in approximately half of those cases. To the court system that number suggests that 96 cases were dismissed due to Court Rule 5, but it doesn't show up that way in DOL's numbers.

He referenced Mr. Svobodny's comments during the Crime Summit about the appropriateness of having one case management system and highlighted that DOL's numbers for FY11 show a 14.5 percent dismissal rate for felonies, including the plea negotiations mentioned previously.

3:02:17 PM
CHAIR FRENCH asked Ms. Meade to address the second question, the time to get a case to disposition in felony court.

MS. MEADE referred to a report showing the number of days to disposition for each type of felony at filing. She highlighted that for all felonies the mean from filing to disposition is 216 days, whether it's a sentence, dismissal or acquittal. Also important is that 89.4 percent of all felonies are disposed within 181 to 365 days. She further highlighted that the more serious offenses take longer to dispose. They take longer to prepare for both the prosecution and defense. She noted that the mean to dispose unclassified felony murder cases is 550 days, or 18 months as opposed to a class C felony at 165 days.

CHAIR FRENCH asked what "felony conversion" refers to.

MS. MEADE explained that the column shows the cases that were disposed before the conversion to CourtView.

CHAIR FRENCH thanked Ms. Meade and Mr. Skidmore for the charts and discussion.

3:06:50 PM
There being no further business to come before the committee, Chair French adjourned the meeting at 3:06 p.m.